Mercury Marine Division of Brunswick Corporation *and* District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 30-CA-6456

December 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on April 24, 1981, by District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, herein the Union, and duly served on Mercury Marine Division of Brunswick Corporation, herein Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint and notice of hearing on May 27, 1981, and an amendment to the complaint on August 20, 1981, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge and amended complaint were duly served on the parties to this proceeding. On June 8, 1981, Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed in its entirety.

On August 27, 1981, counsel for the General Counsel filed directly with the Board a motion to transfer the proceeding to the Board and a Motion for Summary Judgment. The General Counsel submits, *inter alia*, that Respondent, in its answer, is merely attempting to relitigate matters which could or should have been litigated in the unit clarification proceeding, Case 30-UC-158. Subsequently, on September 1, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a brief letter response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the General Counsel's Motion for Summary Judgment, Respondent admits the refusal to bargain as to employees classified as Process Coordinator I's but contends that it did not violate the Act because such employees are not properly part of the appropriate unit represented by the Union.[1] Respondent predicates its refusal to bargain on the following grounds. Respondent contends that during the term of the collective-bargaining agreement effective June 19, 1978, to June 15, 1980, it was determined through the grievance arbitration procedures that Process Coordinator I's were not within the collective-bargaining unit. Respondent also contends that during subsequent negotiations the Union unsuccessfully sought to have Process Coordinator I's included in the unit and that the current agreement effective June 16, 1980, to June 18, 1982, does not cover the Process Coordinator I's.

As to the allegations covering the Board Decision reported at 254 NLRB 1120 (1981), Respondent admits that the Board issued a decision on review but contends that the decision was erroneous, unsupported by substantial evidence on the record and violated due process. Respondent further contends that the case should have been remanded to the Regional Office for a hearing on the issues of fact concerning bargaining negotiations leading to the 1980-82 agreement and the impact of such negotiations on the contractual recognition articles.

In addition, Respondent contends that the Process Coordinator I's cannot be part of the production and maintenance unit because the duties of such persons make them supervisors within the meaning of Section 2(11) of the Act. Further, Respondent contends that subsequent to the submission of the record to the Regional Director and prior to the decision by the Board in Case 30-UC-158 numerous changes were made in the position of Process Coordinator I and that these changes compel a finding that Process Coordinator I's are statutory supervisors, and that, even assuming the validity of the Board's Decision, those employees should be excluded from the unit.

Finally, Respondent admits the factual allegations concerning the refusal to bargain with the Union as to the Process Coordinator I's on April 24, 1981, but it denies the conclusionary legal allegations regarding the refusal to bargain.

[1] Respondent also admitted the factual and legal allegations pertaining to service of the charge and complaint, that it is an employer engaged in commerce within the meaning of the Act, and that the Union is a labor organization within the meaning of the Act. In addition to other allegations of the complaint that Respondent denied, which are described elsewhere in this Decision, Respondent also denied the complaint allegation in par. 4(a) regarding the scope of the unit, and claimed instead that the Union has been designated the exclusive bargaining representative for *certain* production and maintenance employees at Respondent's Fond du Lac facility. Thereafter, the General Counsel amended par. 4(a) of the complaint to describe the unit as *certain* production and maintenance employees, thereby accommodating Respondent's answer in this respect.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

In her Motion for Summary Judgment, counsel for the General Counsel urges that Respondent, by its answer and refusal to bargain, is merely attempting to relitigate matters which could or should have been litigated in the unit clarification proceeding, and that the issues raised by Respondent as a justification for a hearing are either irrelevant or insufficient as a matter of law to justify a hearing now. We agree.

Respondent's contention that the Board should defer to the arbitrator's decision was previously litigated before the Board in Case 30–UC–158, reported at 254 NLRB 1120 (1981). There the Board noted that issues concerning the appropriateness of bargaining units are particularly within the Board's expertise and the Board does not defer to such an award.

Respondent's reliance on the Union's failure to insist that Process Coordinator I's be included in the unit during contract negotiations that took place after the Union filed the petition in Case 30–UC–158 is similarly misplaced. The Board has long held that where, as here, the petition was filed before the negotiations the opposing party was on notice that the petitioner intended to resolve the unit issue through the Board's procedures rather than through negotiations.[3] We find it unnecessary, therefore, to resolve any disputed factual allegations concerning the post-petition contract negotiations.[4]

As to Respondent's contention that Process Coordinator I's are statutory supervisors and therefore must be excluded from the unit, we note that this issue was raised and litigated during the unit clarification proceeding (30–UC–158) *supra*. As such, this issue cannot be relitigated now, absent newly discovered evidence or special circumstances. In this connection, Respondent has sought to introduce evidence that the disputed employees' job duties have changed substantially since the Board's Decision issued. This assertion, if true, would not change the result here but would constitute additional evidence of Respondent's refusal to bargain with the Union since it would have made unilateral changes without bargaining.[5]

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a Delaware corporation, with an office and place of business in Fond Du Lac, Wisconsin. It is engaged in the manufacture and nonretail distribution of marine propulsion equipment. During the past calendar year, a representative period, Respondent, in the course and conduct of its business operations, sold and shipped from the Fond du Lac facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Wisconsin.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

District No. 10, International Association of Machinists and Aerospace Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

For over 20 years, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of certain production and maintenance employees employed by Respondent at its Fond du Lac facility and has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] *The Western Colorado Power Company*, 190 NLRB 564, fn. 1 (1971); *Peerless Publications, Inc.*, 190 NLRB 658 (1971); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973); and *WNYS–TV (WIXT)*, 239 NLRB 170 (1978).

[4] The Union denied that any acquiescience occurred regarding the Process Coordinator I's during the negotiations.

We note that Respondent claims the Union unsuccessfully sought inclusion of the Process Coordinator I's during recent negotiations but does not claim the Union withdrew its claim in exchange for other concessions during negotations. See *WNYS-(WIXT), supra* at 170.

[5] See *Highland Terrace Convalescent Center*, 233 NLRB 87 (1977).

In this connection, it is well settled that an employer has a duty to bargain when it changes the duties of bargaining unit employees' classification which result in the employees' removal from the bargaining unit to supervisory positions. See *Kendall College*, 228 NLRB 1083 (1977), enfd. 570 F.2d 216 (7th Cir. 1978); and *Fry Foods, Inc.*, 241 NLRB 76 (1979).

most recent of which is effective by its terms for the period June 16, 1980, through June 15, 1982.

On March 5, 1981, the Board issued a Decision on Review and Order in Case 30-UC-158, reported at 254 NLRB 1120, clarifying the unit referred to above by including therein the employees classified as Process Coordinator I who are employed by Respondent at its Fond du Lac facility.

The unit of employees described in the Board's Decision, above, and set forth below, constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Departments, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which may be added to the collective bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act.

As indicated above, Respondent has admitted the factual allegations in the complaint to the effect that the Union requested, in March 1981, that Respondent bargain collectively with it concerning the wages, hours, and other terms and conditions of employment of Respondent's employees classified as Process Coordinator I's and that, thereafter, Respondent has failed and refused to bargain with the Union concerning such terms and conditions of employment of the employees classified as Process Coordinator I's.[6]

We find that by the aforesaid conduct Respondent has refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that such conduct violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Mercury Marine Division of Brunswick Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Department, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which

[6] In its motion to transfer the proceeding to the Board and Motion for Summary Judgment, the General Counsel presented certain exhibits that reveal the chronology of the refusal to bargain as follows. In or about the second week of March 1981, the Union, by its business representative, Joseph Develice, orally requested that Respondent bargain with it concerning the wages, hours, and terms and conditions of employment of the employees classified as Process Coordinator I pursuant to the Board's Decision. On or about March 27, 1981, the Union, by certified letter from Directing Business Representative Richard A. Presser to Respondent's Manager of Public Relations Ronald Hanson, again requested bargaining concerning the employees classified as Process Coordinator I. On or about April 15, 1981, Respondent by Hanson, orally refused to bargain regarding the Process Coordinator I's, and informed union business representative Develice that Respondent did not intend to abide by the Board's Decision.

may be added to the collective-bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain with the Union concerning the wages, hours, and other terms and conditions of employment of the employees in the aforesaid appropriate unit classified as Process Coordinator I, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mercury Marine Division of Brunswick Corporation, Fond du Lac, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of its employees in the appropriate unit set forth below concerning the wages, hours, and other terms and conditions of employment of the employees in the said appropriate unit classified as Process Coordinator I. The appropriate unit is:

> All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Departments, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which may be added to the collective bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Upon request, bargain collectively with District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of all the employees in the appropriate unit set forth above concerning the wages, hours, and other terms and conditions of employment of employees in the said appropriate unit classified as Process Coordinator I. Any understanding reached shall be embodied in a signed agreement.

(b) Post at its facility in Fond du Lac, Wisconsin, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail and refuse to bargain collectively in good faith with District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate unit described below concerning the wages, hours, and other terms and conditions of employment of employees in the said appropriate unit classified as Process Coordinator I. The appropriate unit is:

All production and maintenance employees, including all classifications in the Production Departments, the Production Tool Room, the Machine Shop, the Testing Department, the Maintenance Department, Buildings and Grounds, Oil Facility, the Foundry Facility, Die Cast Facility, including Process Coordinator I's, Customer Service and Repair Department, Floor Inspectors, Final Inspectors, and Salvage Inspectors in the Inspection Department, Time Recording Clerks, Lead persons, Mechanic Specialists, Cycle Counters, Distribution Facility, Shipping and Receiving Department, Investment Castings Facility, and all other production and maintenance departments which may be added to the collective bargaining unit in the future covered by an agreement, but excluding all executives, office and clerical employees, laboratory employees, professional employees, sales representatives, product development and testing personnel, layout inspectors, paint inspectors, final line inspectors, watchpersons, guards and supervisory employees as defined in the Labor-Management Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive bargaining representative of all employees in the appropriate unit described above concerning the wages, hours, and other terms and conditions of employment of the employees in said appropriate unit classified as Process Coordinator I.

MERCURY MARINE DIVISION OF
BRUNSWICK CORPORATION